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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Distribution of	)	Docket No. 16-CRB-0009 CD (2014-17)
2014-2017	)	
Cable Royalty Funds	)	

In the Matter of	)	
	)	
Distribution of	)	Docket No. 16-CRB-0010 SD (2014-17)
2014-2017	)	
Satellite Royalty Funds	)	

MULTIGROUP CLAIMANTS' RESPONSIVE BRIEF TO COMMENTS ON CLAIMANT CATEGORY DEFINITIONS

Multigroup Claimants hereby submits its *Responsive Brief to Comments on Claimant Category Definitions*, submitted in response to the *Joint Comments of 2014-2017 Cable and Satellite Participants* ("Joint Brief") and the *Program Suppliers Briefs* ("MPAA Brief"), and pursuant to the Judges' *Notice of Participants and Order for Preliminary Action to Address Categories of Claims* issued in this matter on March 20, 2019.1

1 For all intents and purposes, the comments separately filed by each of two parties for each of the 2014-2017 cable and 2014-2017 satellite proceeding are the same. For such reason, Multigroup Claimants responds in a single brief that will be lodged in each of the dockets.

A. THE JOINT BRIEF FAILS TO PROVIDE ANY RATIONALE FOR ITS PROPOSED USE OF CLAIMANT CATEGORY DEFINITIONS OTHER THAN THAT SUCH DEFINITIONS HAVE BEEN HISTORICALLY UTILIZED.

The Joint Brief effectively asks the Judges to avoid any critical review of the claimant categories that have been historically utilized, and simply continue relying on the definitions privately agreed upon because "that is the way it has been done in the past". The Joint Brief avoids noting that such definitions have all been stipulated via private agreement, and have never been subject to judicial or administrative scrutiny, or even public notice. Had such definitions been analyzed in connection with the issue for which they were originally created, i.e., the decisions of system operators as to why they select to retransmit one broadcast station versus another, then the current definitions would have been exposed as having been created for the purpose of narrowing certain categories to only the programming claimed by certain claimants, and expanding other categories to be as broad as possible. Edifying the desires of a handful of claimant groups, however, has never been a legitimate reason for imposing the claimant category definitions.

For certain, most of the definitions that have been utilized in the past are unchallenged, and the definitions applied are without practical consequence.

Nonetheless, those addressed by Multigroup Claimants in its moving comments create unwieldy distinctions that would leave any participant scratching their head. The application of several arbitrary distinctions that fail to accurately define particular categories of programming -- e.g., a "live" sports broadcast being part of the sports programming category, but not a re-broadcast of the identical event or a tape-delayed broadcast thereof -- requires unnecessary effort in order to filter programming into the byzantine category (or categories) to which a program must be arbitrarily assigned.2 Because categories are not merely defined by the *type* of programming included therein, but also the *nationality* of the claimant, the *national source* of the over-the-air transmission, or the *character of the broadcaster*,3 or a combination thereof, discerning into which category (or categories) a particular program should be placed is often far from clear.

It did not escape Multigroup Claimants that the handful of factual representations made in the Joint Brief in order to support its argument, were

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2 As noted in Multigroup Claimants' moving comments, a program is often placed in multiple categories, based on nothing more than the source of the originating over-the-air broadcast, even though such program is only being retransmitted to U.S. subscribers.

3 For example, a different category is applied to programs first appearing on commercial versus noncommercial broadcasters.

incorrect or misleading. Using the 2010-2013 cable proceedings as a model, the Joint Brief incorrectly asserts that "no disputes ultimately needed to be resolved by the Judges regarding the categorization of any of the millions of programs at issue across the allocation-phase categories." Joint Brief at 2. In fact, programming claimed by Multigroup Claimants in the sports programming category was challenged by the Joint Sports Claimants as not being in such category, thereby requiring a ruling by the Judges.4

4 The Joint Sports Claimants succeeded in having the live soccer matches appearing in Liga Mexicana (owned by claimant Azteca International Corporation) removed from the sports programming category and placed into the Program Suppliers category. See *Ruling and Order Regarding Objections to Cable and Satellite Claims*, Docket nos. 14-CRB-0010-CD (2010-2013) and 14-0011-SD (2010-2013), at 49. The basis of the Judges' ruling was that "[n]either the JSC nor the Judges can ascertain the nature of the Azteca [Spanish-language and Spanish-title] programming because the titles are listed in Spanish and are presented without the requisite English translation". Id.

Multigroup Claimants had produced the program lists compiled firsthand by Azteca, which identified programming according to the only program title ever known for such programming. The lists identified the title that appears in every television listing, and in all data reporting such program broadcasts, which is exclusively in Spanish. Multigroup Claimants had already produced lists of its claimed programming, demarcated according to the historically utilized claimant categories. While Azteca's lists had additionally placed each of those programs into a handful of Spanish-language categories -- Deportes (sports), Especiales and Espectaculos (specials), Entretenimiento (entertainment), Infantil (children's), Noticias (news), Novelas (soap operas) – the historically utilized categories had already been identified. While Multigroup Claimants found translations of those categories somewhat obvious, no request for translation was ever made by either

The Joint Brief also misleadingly asserts that "over 99 percent of the 2010-2013 cable royalties are being distributed by the participating allocation-phase parties to their claimants without presenting any distribution-phase disputes for resolution by the Judges". The footnoted reference to Multigroup Claimants' award in the Program Suppliers category is misleading for the obvious fact that such award was premised on dismissing the vast bulk of Multigroup Claimants' programming claims because of a denial of the "presumption of validity" that was afforded to all other claimants, a matter currently under appeal.

Finally, the Joint Brief mischaracterizes an order issued in response to a motion for distribution of 2003 cable royalties. According to the Joint Brief, the Judges previously rejected a proposed Spanish-language category, and elected to maintain the historically utilized definitions on the grounds that "retaining the longstanding categories was *necessary* 'in the interests of promoting certainty and future settlements'". Joint Brief at 3 (emphasis added). Read in its entirety,

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the JSC or the Judges, and were irrelevant to the categories for which Multigroup Claimants was asserting placement. Multigroup Claimants had already produced to the parties the list of Spanish-language program titles in a spreadsheet identifying which claimant category each program belonged.

In sum, Azteca's lists were not considered because Azteca identified the program titles by the only title by which they had ever been identified, a Spanish-language title.

however, the order paints a much narrower ruling:

> "IPG, the only commenter that supported creation of an additional Phase I category--that for Spanish language programming--fails to make a persuasive argument why such programming is not fairly represented by the current claimant categories. Indeed, several of the commenters, which represent current claimant categories, indicated that they have long represented the interests of Spanish language programming. The Judges are aware of no Spanish language programmer that is dissatisfied with its representation by the current categories of claimants.5 Therefore, in the interests of promoting certainty and future settlements, we refrain from recognizing additional Phase I claimant categories *at this time*."

Order Granting Partial Distribution of 2003 Cable Royalty Fund, Docket no. 2005-4 CRB CD 2003 (Jan. 23, 2008), at 3 (emphasis added).

Contrary to the assertion of the Joint Brief, the Judges did not conclude that the "longstanding categories" were "necessary" in the interests of promoting certainty and future settlements. Rather, they rejected the argument that a Spanish-language category was needed *at that time*. Even though the claimant category

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5 The Judges' statement was curious for several reasons. Independent Producers Group informed the Judges that it represented Spanish-language producers, that Spanish-language programming then *exceeded* the volume of several Phase I categories (and was still growing), but that as a practical matter Spanish-language programming was not being addressed or compensated by any existing distribution methodology. That is, Spanish-language programming was being shut out of the retransmission proceedings. Clearly, such fact, expressed by a representative of Spanish-language programming, sufficiently expressed "dissatisfaction" with the current categories of claimants.

contradictions described above are obvious for any person whom has dealt with such definitions, at this juncture all Phase I/Allocation participants have been expressly aware for at least a decade that there are issues with the parameters of such definitions and, presumably, are capable of absorbing or excluding programming in their data preparation based on varying definitions. Maintaining the "longstanding categories" was never expressed by the Judges as "necessary", and the concern for "promoting certainty and future settlements" should no longer apply.

B. THE MPAA BRIEF FAILS TO PROVIDE ANY RATIONALE FOR ITS PROPOSED USE OF CLAIMANT CATEGORY DEFINITIONS OTHER THAN THAT SUCH DEFINITIONS HAVE BEEN HISTORICALLY UTILIZED.

As regards the MPAA brief, it appears to address a variety of issues not contemplated by the Judges' order, e.g., whether the representatives of particular claimant categories can make claim for ineligible works6, and the scope of discovery to address such issue. As to what Multigroup Claimants considered to be

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6 While poised as a definitional issue by the MPAA, in the absence of the Allocation representatives affirmatively addressing the program eligibility issue within any stipulated definition (i.e., "all definitions include ineligible unclaimed works"), such issue appears to be more of an issue as to the validity of any data ascribing value to ineligible unclaimed works than a definitional issue.

the significant issue, i.e., whether the claimant category definitions apply rational criteria in order to categorize programs, the MPAA brief sits silent other than to ask the Judges to make nominal clarifications already presumed by all parties.

Of course, the claimant category definitions should not be adopted simply because they are the definitions that have been used in the past. Nor should the Judges impose "clarifications" of category definitions if a broader rationale for segregating one category from another does not exist. The claimant category definitions could easily discriminate between retransmissions occurring on "weekdays" versus "weekends", or "even days" versus "odd numbered days", but such distinction would be arbitrary, and no rational basis would exist for making *those* particular distinctions. No differently, the MPAA's desire to clarify that "non-live team sports programs" (and apparently, all *individual* sports programs) remain within the Program Suppliers category, without distinguishing *why* such sports programs are more akin to entertainment-related programming than sports programming in the eyes of system operators, misses the point. To that seminal issue, the MPAA provides no commentary.

CONCLUSION

In sum, while both the Joint Brief and the MPAA Brief seek adoption of the claimant category definitions historically utilized, neither offers any rationale for

the category criteria other than "that has been what was used in the past". Neither brief appears to tie such definitions to the criteria used by system operators determining which broadcast stations to retransmit and, for that reason, provide no information to which Multigroup Claimants can even respond.

To that dearth of explanation, the Judges must apply common sense in order to resolve whether the historically utilized definitions should continue to apply, or whether the Judges should instead impose claimant category definitions that instead align with system operator perspectives. While all the criteria considered by system operators might not be concisely contained in any singular definition, it is safe to say that system operators do not impose the arbitrary criteria advocated by the Joint Brief and the MPAA Brief. Those criteria were historically created and maintained by certain claimants for reasons unrelated to system operator decision making.

Respectfully submitted,

Dated: May 3, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2019, a copy of the foregoing was sent by electronic mail to the parties listed on the attached Service List.

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